



February 24, 1999

Ms. Patricia Adams  
Assistant City Attorney  
City of Plano  
P.O. Box 860358  
Plano, Texas 75086-0358

OR99-0537

Dear Ms. Adams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122464.

The City of Plano (the "city") received a request from a police officer applicant for information concerning his psychological evaluation. Specifically, the requestor asks for the final results or findings from both of his examinations administered by Dr. Lehman along with the original questions, answers, and test format of the examinations. You contend that because you do not possess the test questions, answers or format, this information is not subject to disclosure. You also argue that the final results of the testing, submitted as Exhibits E and H, are excepted from public disclosure by sections 552.103 and 552.122 of the Government Code. We have considered your arguments and have reviewed the submitted documents.

You first state that the city "has not submitted the test questions, test format, and [the applicant's] answers to the test questions . . . because such documents are not in the City's possession." You also state that the documents are proprietary in nature. You explain that the information was "created and maintained solely by Dr. John Lehman, the clinical psychologist who preformed the testing." See Letter Opinion No. 97-073 (1997). Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." The Open Records Act does not ordinarily require a governmental body to obtain information not in its possession. Open Records Decision Nos. 558 (1990), 499 (1988). If, however, information is collected, assembled, or maintained by a third party, it will be subject to disclosure under chapter 552 of the Government Code if a governmental body owns or has

a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988) (relevant facts in determining whether information held by consultant is subject to the Open Records Act are: 1) information collected by consultant must relate to the governmental body's official business; 2) consultant must have acted as agent of the governmental body in collecting information; and 3) governmental body must have or be entitled to access to the information). We have additionally observed that certain factors are relevant, although not exhaustive, in deciding whether a document is essentially a governmental or personal document: who prepared the document; the nature of its contents; its purpose or use; who possessed it; who had access to it; whether the governmental body required its preparation; and whether its existence was necessary to or in furtherance of official business. Open Records Decision No. 635 at 4-5 (1995).

We understand from your arguments that the city does not own or have a right of access to the requested test questions, answers, or format. If the city does, however, have a right of access to this material, the information is "public information" subject to disclosure. Gov't Code § 552.002(a)(2). An officer for public information is required to promptly produce public information. Gov't Code § 552.221(a). Failure to do so is subject to civil enforcement and criminal penalties. Gov't Code §§ 552.321, .353. You should use caution before denying any request for information simply because the material is not now in the possession of the city. Consequently, if the city has a right of access to the requested test information, it is "public information." The information may, nonetheless, be excepted from disclosure. *See* Gov't Code § 552.110 (trade secret and commercial or financial information); T.A.C. § 465.22(d); Letter Opinion No. 97-073 (1990) (concerning the release of psychologist's test data and protocols as patient records under section 611.045(a) of the Health and Safety Code).

You next argue that the final results of the applicant's examination, the "Pre-employment Psychological Evaluation," Exhibits E and H, are excepted from disclosure by sections 552.103 and 552.122 of the Government Code. We have examined the submitted documents. We believe that these documents are mental health patient records the release of which is governed by provisions outside the Open Records Act. *See* Open Records Decision No. 598 (1991).

Section 611.002 of the Health and Safety Code states as follows:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

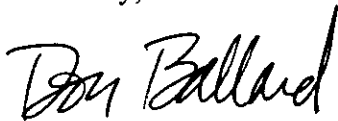
Section 611.0045(a) of the Health and Safety Code reads as follows:

(a) Except as otherwise provided by this section, a patient is entitled to have access to the content of a confidential record made about the patient.

The requestor in this instance is the subject of the records at issue. Since the requestor is the "patient," section 611.0045(a) gives the requestor a right of access to the requested information, except as provided by other subsections of section 611.045. *See* Open Records Decision No. 565 at 3 (1990) (upon written consent of subject, mental health records must be released); Open Records Letter Nos. 97-2051 (1997), 97-1465 (1997), 97-1146 (1997). Other subsections of section 611.0045 permit a professional to deny a patient access to that patient's mental health records, but only in certain circumstances and in accordance with certain procedures that do not appear applicable here. *See* Health and Safety Code § 611.0045(b)-(j). Consequently, the city must release the requested results to the requestor in accordance with the disclosure provisions of chapter 611 of the Health and Safety Code.

In view of our disposition, we do not address your additional claimed exceptions. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Don Ballard  
Assistant Attorney General  
Open Records Division

JDB\nc

Ref: ID# 122464

Enclosures: Submitted documents

cc: Mr. Acie Gilkey, Jr.  
9701 W. Ferris Branch # 322  
Dallas, Texas 75243  
(w/o enclosures)